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Attorneys for Charging Party INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL UNION 720 (IATSE)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

LABOR PLUS, LLC, AND ITS SUCCESSOR WYNN LAS VEGAS, LLC and WYNN LAS VEGAS, LLC and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL UNION 720 (IATSE)	No. 28-CA-161779 28-CA-166571 28-CA-166890 **INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL 720'S CLOSING BRIEF**

This case presents a fairly straight forward issue on the relationship between a successor employer and a certified union. In April 2015, the Union, International Association of Theatrical Stagehand Employees, Local 720 (IATSE or Union), filed a petition for representation with Region 28 of the National Labor Relations Board asserting majority representation of the stagehand employees of Labor Plus, LLC employed at the theater housing the Showstoppers show at the Wynn Hotel and Casino. After the election, but prior to the certification of representative issuing, the Wynn hired the majority of the employees who had been employed by

Labor Plus and cancelled its agreement with Labor Plus to provide stagehand services for the Showstopper show. The stagehands who were rehired by the Wynn represented a majority of stagehand employees employed by the Wynn. They continued their same work on the same show, in the same theater, with the same daily staffing and same work assignments. Under established Board law, the obligations associated with this unionized workforce shifted from Labor Plus to the Wynn. The Wynn has refused to recognize the Union, has failed to bargain in good faith after requests to bargain were made, failed to respond to requests for information and has subcontracted bargaining unit work without bargaining with IATSE.

I. THE HISTORY OF REPRESENTATION (28-RC-150168)

On April 15, 2015, IATSE filed a petition for representation with Region 28 to represent the stagehand employees of Labor Plus, Inc. performing work at the Showstoppers Theater at the Wynn Hotel and Casino. (JX 20, fact 3). A stipulated election agreement was entered into and an election was held on May 2, 2015 (*Id*., facts 5 & 7). There were 19 employees on the eligible voter list as well as a separate list denoting 2 employees whose eligibility had not yet been determined. (*Id*., fact 6). There were 16 ballots cast in the election and the employer, Labor Plus, challenged each and every voter on the grounds that no employee had an expectation of continued employment (*Id*., fact 7).

In addition to challenging the ballots, Labor Plus filed objections to elections and a hearing was held on May 27, 2015 to resolve the challenged ballots and objections. (*Id*., facts 9 & 10). The result of the hearing was the Hearing Officer's Report on Challenged Ballots and Objections, issued on June 17, 2015, and a Decision and Order Overruling Objections and Directing Opening and Counting of Ballots, issued on August 10, 2015 (*Id*., facts 11 & 16). The Decision overrules each objection and directs 12 ballots to be opened. Three ballots were determined to have been cast by ineligible voters as those individuals were employed by the Wynn, and not Labor Plus, at the time of the election. (JX 14). The issue of eligibility of the casual employees was set aside and was not to be litigated unless the ballot would be determinative.[1] (*Id*.) Twelve (12) ballots were opened and all were cast for the Union. (GC Ex.

[1] There was 1 ballot cast by a casual employee.

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23). As a result the ballot of the casual employee was not determinative and the issue of eligibility was not resolved. The Certification of Representative issued on December 1, 2015 (JX 15).

II. THE TRANSITION FROM LABOR PLUS TO WYNN

Unfortunately, by the time certification issued, Labor Plus's contract with the Wynn had been cancelled and all stagehand work at the Showstoppers Theater was expected to be performed by individuals directly employed by the Wynn.

By email dated April 17, the Wynn notified an employee of Labor Plus's parent company, Production Resource Group, L.L.C., that it would be terminating its agreement for services as it would "bring the stage technician jobs 'in house'." (JX 3; *see* JX 1 confirming a relationship between Labor Plus and PRG). Labor Plus and Wynn memorialize this agreement by entering in to a termination of services agreement that took effect on May 9, 2015 (JX 20, fact 8 & JX 6).

The Wynn hired most of the stagehands that had previously been employed by Labor Plus on the Showstopper show. (See JX 20, facts 24-28).

III. A MAJORITY OF THE FULL COMPLEMENT OF STAGEHANDS EMPLOYED BY THE WYNN HAD BEEN EMPLOYED BY LABOR PLUS

Monica-Marie Coakley is the Assistant Director of Technical Operations at the Wynn Encore Theater that houses the Showstopper Show. Coakley testified that a full complement of stagehands for staging the Showstopper show is 16 employees but on most days they operate with 14 employees.

A full complement of 16 employees was in place prior to the termination of Labor Plus's contract on May 9. Of the 16 stagehands (including steady extras and excluding Coakley) employed on May 9, 13 were employed by Labor Plus in the period immediately preceding their employment with Wynn. (JX 20, facts 24-28).

Coakley is excluded from the above count as she is a 2(11) statutory supervisor. Per her testimony, she has the ability to (and does) hire and fire employees. Further Coakley is responsible for the daily direction and supervision of the work of the stagehands and had served in that roll regardless of whether the stagehands were employed by Labor Plus or the Wynn. As

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such, although she was employed by the Wynn prior to April 15, 2015, she is not appropriately included in the count of bargaining unit stagehands. (JX 20, fact 24).

Of the thirteen employees hired by Wynn who had previously worked for Labor Plus, a few were hired by the Wynn after the petition was filed but before the election (Lewis, Contini, Herlihy, and Stephenson) (See JX 20, fact 25). Weigant was also hired by the Wynn prior to the election (JX 20, fact 25) but he was determined to be an eligible voter by the Regional Director's Decision (JX 14).

Six employees, who were eligible voters in the Labor Plus election, were hired by the Wynn on May 5 (Portzer, Jensen-Miller, Fouts, Meyers, Shafer and Barnes). (Compare JX 20, fact 26 and JX 5) One employee was hired on May 6 (White) (JX 20, fact 27). It was stipulated that White was formerly employed by Labor Plus but for reasons unknown, he does not appear on the voter eligibility list (Compare JX 20, fact 27 and JX 5). On May 8, 2015, the last work day before agreement between Labor Plus and Wynn in terminated, the Wynn hired another employee who was eligible to vote in the Labor Plus election (Cresson). (Compare JX 20, fact 28 and JX 5). At this time, a full complement of employees was in place at the Wynn. 13 were previously employed at Labor Plus and 9 of the 16 had been eligible to vote in the May 2 election.

Finally, on May 11, 2015, the Wynn hired yet another eligible voter from Labor Plus (Zobrist). (Compare JX 20, fact 29 and JX 5). It is thus established that at the time the Wynn secured its full complement of employees to stage Showstoppers, the majority had been previously employed by Labor Plus.

It is well established that a successor employer, who continues the same operation with a majority of employees who had been represented by a union with a predecessor employer, has a bargaining obligation with the union who represented the employees of the predecessor employer. As stated by the Supreme Court, "[i]t has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer." *NLRB*

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v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 279 (1972), relying in part on *Northwest Glove Co., Inc.*, 74 NLRB 1697 (1947).

Wynn may try to argue that the majority of the current employees (or the majority of employees at the time certification issued) were not individuals who had previously worked for Labor Plus in the Encore Theater and thus the preference of the Labor Plus employees to have a union should not be imputed to the Wynn. Such an argument should be rejected as the Union is entitled to an insulated year after certification during which the employer is unable to claim that the union has lost majority status. *See Chelsea Industries, 331 NLRB 1648 (2000) enforced 285 F.3d 1073 (DC. Cir. 2002); See also NLRB v. 1199, National Union of Hospital and Healthcare Employees,* 824 F.2d 318 (4th Cir. 1987) ("We are unpersuaded by employer's contention that the high rate of turnover … requires us to deny enforcement. Where a union is certified after a representation election, the employer cannot challenge majority status until it has bargained with the union for a reasonable period, usually one year. *Brooks v. NLRB*, 348 U.S. 96 (1954); see also *NLRB v. Mr. B. IGA, Inc.*, 677 F.2d 32, 34 (8th Cir. 1982).")

The *Burns* factors establishing a successor relationship between Labor Plus and Wynn have been met and as a result, Wynn is the successor employer and has a bargaining obligation to IATSE, the certified representative of its stagehand employees. This obligation, as demonstrated below, is retroactive to the date it took over the operations.

IV. IATSE AND WYNN

On June 26, 2015, IATSE, through its counsel, sent a demand to bargain to Labor Plus and Wynn. (JX 20, fact 12 and JX 12). The letter demanded to begin bargaining and information in preparation for bargaining. (JX 12). Labor Plus did not respond but Wynn did (JX 20, facts 13 & 15). In its response, Wynn disagrees with the basic contention that it has any bargaining obligation towards IATSE. (JX 13). The Wynn did not accompany the response with any of the information sought in the letter. (*See id.*).

At all times from April 14, 2015 through the present the Showstoppers Show has been in a continuous run except for planned weeks where the show is dark. In one of those weeks, November 28 to December 5, 2015, a special event was planned for the theater. (*See* GC Ex. 22).

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In lieu of Showstoppers, the theater was used for a Frank Sinatra 100th birthday celebration show. The Wynn stagehands did preparatory work for this show and dismantled the show. (*See* GC Ex. 24). The show was performed on one day (December 2nd) and was televised. (GC Ex. 22).

V. LABOR PLUS'S FAILURE TO BARGAIN

Labor Plus, in addition to disputing unionization every step of the way by challenging each ballot, filing objections to the election, filing exceptions to the Hearing Officer's Report, and requesting review of the Regional Director's Decision and Order, failed to recognize and bargain with the union. (See JX 20, facts 7, 9, 14, 17 and referenced exhibits). Counsel for the General Counsel moved at Trial to amend the Complaint to eliminate the allegations against Labor Plus. The Office of Appeals had specifically directed complaint to issue against Labor Plus. (JX 19).

Labor Plus refused to bargaining in good faith in response to a bargaining demand made by IATSE on June 26, 2015. (JX 20, facts 12 and 13). The demand to bargain was made on the heels of the Hearing Officer's Report on Challenged Ballots and Objections (See *id*., fact 11). By so refusing, it denied the Union an opportunity to negotiate the effects of the employees' separation from Labor Plus when Wynn cancelled the service agreement. While many of the Labor Plus employees transitioned to Wynn, one did so *after* the Labor Plus agreement terminated (Zobrist) and others were not hired on by Wynn at all (Karlsen, Lugo, Perrill, Pomeroy, Tate Sr., Utterback, Gable, C. Portzer). Each of these employees is entitled to at least a *TransMarine* remedy and thus it was inappropriate for the allegations in the complaint to be dismissed.

It is established Board law that an employer is liable for its unfair acts that occur in the period between a representation election and the eventual Certification of Representative. In *Mike O'Connor Chevrolet Co., Inc.*, 209 NLRB 701 (1975) remanded on other grounds, 512 F.2d 684 (8th Cir. 1975), the Board held that an employer who makes unilateral changes in the period between an election and certification may be charged with 8(a)(5) violations after certification issues. This serves the purposes of the Act as it discourages employers from postponing their bargaining obligation. Employers who make unilateral changes during the pendency of objections to a representation election thus do so at their peril. "If the election challenge proves

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fruitless, an order by the Board based on the refusal to bargain will be enforced." *NLRB v. W.R. Grace & Co.*, 571 F.2d 279, 282 (5th Cir. 1978); *NLRB v. McCann Steel Co.*, 448 F.2d 277, 279 (6th Cir. 1971).[2]

In *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), the Board held when an employer denies the union an opportunity to engage in meaningful effects bargaining that could reduce the hardship of employees who are being laid off, it first tries to recreate a situation in which meaningful bargaining can occur. However, the passage of time can make that impractical and the victims of the wrongdoing should not bear the consequences for another's (their former employer's) wrongful act. As such, employees in these situations are entitled to wages equivalent to at least 2 weeks of employment. Further, wages continue to be earned, if the Union makes a subsequent demand for bargaining, until a resolution is reached, the parties are truly at impasse, or the union bargains in bad faith. 170 NLRB at 390. Here, Labor Plus has refused to engage in bargaining after the election and did not provide a meaningful opportunity to bargain over the effects of the Wynn terminating its agreement with Labor Plus. A *Transmarine* remedy is warranted.

VI. THE SUBCONTRACTING OF STAGEHAND WORK FROM THE WYNN TO LABOR PLUS

Labor Plus, and/or other subcontractors, performed work at the Encore Theater during the Frank Sinatra 100th Birthday celebration show in November and December 2015. Such work was performed by employees of Labor Plus without bargaining with the union. The work performed by Labor Plus employees at the Showstoppers Theater during the Sinatra show was work traditionally performed by non-makeup or wardrobe stagehands.

Even if Labor Plus does not face reckoning for this behavior, the Wynn should. IATSE was the representative of the employees. There was work to be performed by stagehands including the building of mounts for television cameras. This work was subcontracted by the

[2] This analysis is equally applicable to the Wynn as it is to Labor Plus. At the very latest, the Wynn knew of the representation issue on June 26 when it received a demand to bargain from IATSE's counsel (JX 20, fact 12). Wynn's response, JX 13, makes it clear that it knew of the representation proceedings. It is liable for its actions taken in the period between becoming the successor (May 9) and the date of certification (December 1) in addition to being responsible for its actions after certification.

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Wynn to Labor Plus and other entities without notice to the Union or an opportunity to bargain with the Wynn of stagehand work. The work performed by the subcontractors was work that is well within the scope of traditional stagehand work, within the skill sets of stagehands employed by Wynn and was performed in the Showstoppers Theater.

The decision to subcontract work is a mandatory subject of bargaining. *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Here, the Union was denied the opportunity to bargain about this subcontracting based on both Labor Plus and the Wynn's failure to recognize and bargain with the Union. The remedy for a failure to bargain is traditionally an attempt to return the parties to the status quo ante. In this case, since the situation cannot be recreated, a monetary remedy is appropriate.

IATSE operates a hiring hall which provides as needed stage hands to employers. As most, if not all, of the stagehands directly employed by the Wynn were provided work during the week of the Sinatra production (see GC Ex. 24), either those employees would have received overtime for performing the stagehand carpentry work associated with building the mounts or individuals on the Union's out of work list would have been called out to perform the work. The appropriate remedy in this case is to make the individuals who would have performed the work whole for the failure to make the work available.

VII. CONCLUSION

There was no legitimate justification for the Wynn to refuse to bargain with IATSE as it is the perfectly clear successor to Labor Plus for stagehand work performed within the Encore (Showstoppers) Theater). It is well established that an employer is responsible for unfair labor practices that occur after an election but before certification issues. Taken together, these principles require the Wynn to be held responsible for its failure to bargain in general, failure to provide information necessary to bargaining, and failure to bargain over the decision and effects of subcontracting bargaining unit work.

In addition to a *Transmarine* remedy from Labor Plus to the effected employees and wages to those who should have, but did not, receive work that was unilaterally subcontracted away from unionized employees of the Wynn, the Wynn should be ordered to bargain with

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IATSE and to provide the outstanding information requested. Notice of the employer's unfair acts should be posted and read by a company official and, because of the turnover that has occurred at the Wynn, all individuals who worked as stagehands at any time from May 9, 2015 through the present should receive a copy of the Notice mailed to their home.

Dated: December 7, 2016

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By: CAREN P. SENCER

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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on December 8, 2016, I electronically filed the forgoing IATSE'S CLOSING BRIEF with the National Labor Relations Board.

On December 8, 2016, I served IATSE'S CLOSING BRIEF in the manner described below:

☑ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Via E-Gov, E-Filing: Honorable John T. Giannopoulos Administrative Law Judge Division of Judges National Labor Relations Board 901 Market Street, Suite 300 San Francisco, CA 94103-1779	Mr. Larry A. "Tony" Smith National Labor Relations Board, Region 28 Field Attorney 300 Las Vegas Boulevard South, Suite 2-901 Las Vegas, NV 89101 (702) 388-6248 Fax larry.smith@nlrb.gov
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 8, 2016, at Alameda, California.

/s/ Lara Hull
Lara Hull

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